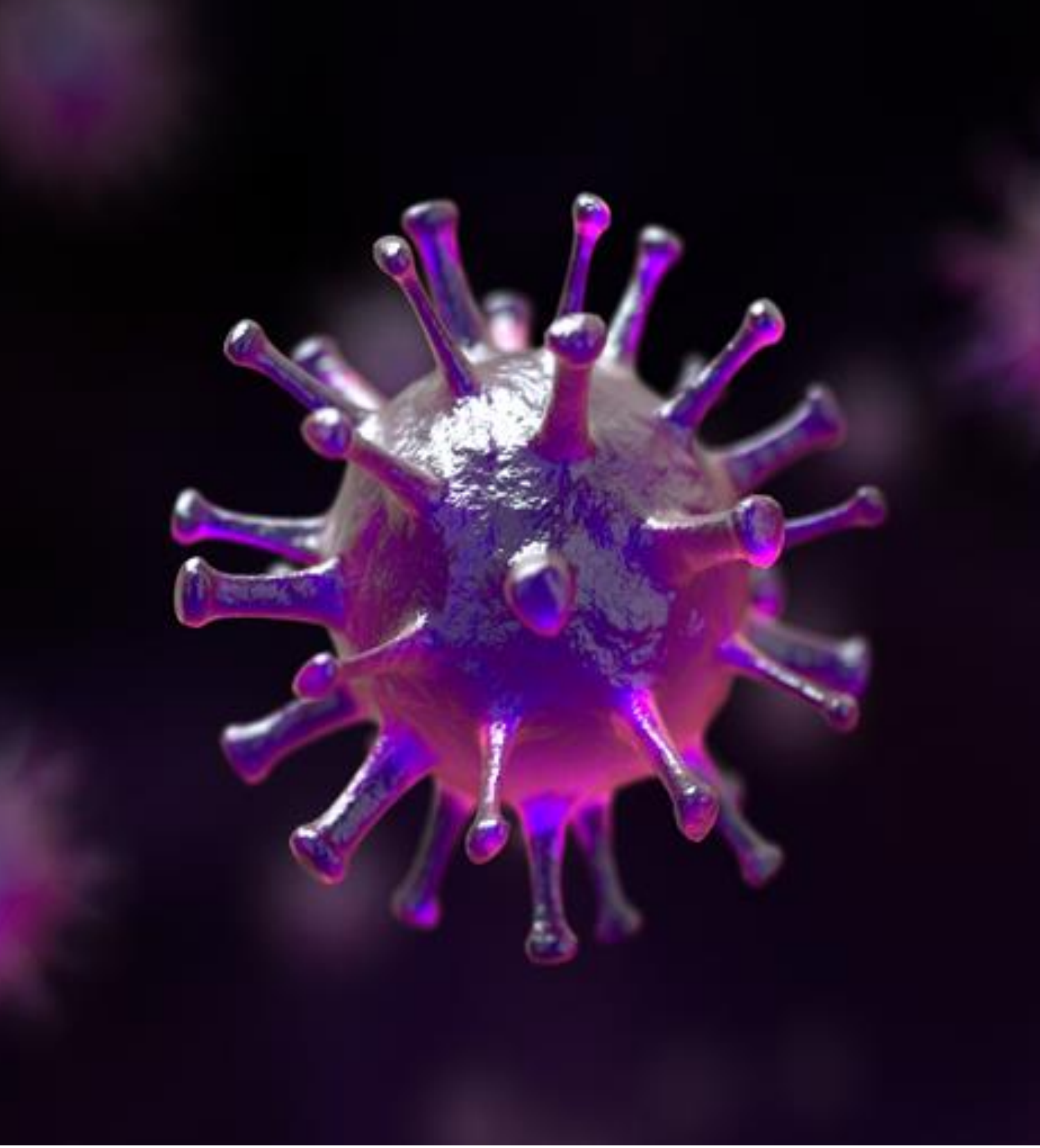

COVID-19: In Relation to Retail Assets

GOWLING WLG

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Covid-19 – Issues for Consideration

Current operational issues

1 Closing shopping centres

Landlords may need to close some shopping centres e.g. on health and safety grounds because there are insufficient staff onsite to run the centre rather than as a result of Government direction. Is this opening the landlords up to potential claims from tenants or a superior landlord?

Yes, but it will depend on how the leases are drafted, how the process is managed and, in the case of tenant claims, the extent to which the closure is in fact preventing their activities and the restrictions on opening for trade imposed by Government guidance and regulations. The current government guidance is that only essential businesses permitted by the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 should be opening for trade, which will make it difficult for tenants whose businesses are not 'essential' to make a claim as they will have to demonstrate that they should be permitted to open for trade as a pre-cursor to running a claim against the landlord.

If it is necessary to close shopping centres, we recommend that a landlord engages with any superior landlord and its tenants candidly and provides details of its operational proposals for their consideration ahead of implementing them, even if this is done at very short notice.

This approach will show that the landlord is behaving responsibly and as fairly as possible in unique circumstances and will either eliminate the threat of claims or, at least, reduce their likely impact. As a minimum, it should flush out any objections.

Potential claims by tenants of "non-essential" businesses

When the Government relaxes the current Regulations, if a landlord wishes to keep a shopping centre closed, claims by tenants are likely to be based on breach of quiet enjoyment covenants and/or derogation from grant.

Quiet enjoyment claims would be based on allegations that the landlord is preventing the tenants from using/enjoying their premises.

Derogation from grant claims would be based on allegations that, by closing the shopping centre, the landlord has done something that is at odds with the terms of the grant of the lease.

In both cases, there are good defences/arguments available to landlords:

- Some leases may require the tenants to observe any reasonable regulations the landlord implements. In the context of future government recommendations for social distancing and restrictions on non-essential travel, a landlord's regulation that closes a shopping centre in such circumstances is likely to be reasonable unless a

tenant's business is deemed to be essential. The defence based on centre regulations is likely to be viewed as more reasonable if coupled with associated service charge reductions.

- If the tenants are not using the premises, then the closure does not cause them any loss.

- Successful derogation from grant and quiet enjoyment claims tend to result in an award of damages to the tenant, which invariably takes the form of a rent reduction for a period of time. We would expect tenants to seek rent concessions for any period of closure, providing landlords with the opportunity to consult with the tenants in relation to the closure and agree any claims as part of that process. Any rent concession letters can be drafted to include settlement wording.

Potential claims by tenants of "essential" businesses

These arguments will not apply to tenants running essential businesses. If the shopping centres include such businesses, landlords will need to consult with them to agree if their stores are essential and, if so, what arrangements can be made for them to continue to trade. A key supermarket may well seek to prevent any closure by obtaining an injunction – these extreme times are likely to increase their chances of success.

See Question 3 below for further commentary.

Claims by superior landlords

These are likely to be based on any headlease obligations given to the superior landlord in relation to the running of the shopping centres. It may be possible to temper the impact of such claims if the obligation to run the centre is qualified by words such as "reasonable" or "responsible". In the current climate, it seems likely that it will be both reasonable and responsible to close facilities where people are likely to gather.

In addition, there may be claims based on obligations to pay geared rents to the superior landlord. The headlease may require the tenant to maximise revenue, although we would expect this to be qualified by a reasonable endeavours obligation. Again, a closure may well be reasonable in the current climate.

See Question 8 below for further commentary.

2 Cutting down shopping centre operations

Should the shopping centre operations be slimmed down including closure of the car park, will this open landlords up to claims?

Yes, but again, it will depend on the leases and how the process is managed with the other parties. We would expect a well-managed slimming down process that is supported by associated reductions in service charge to be unlikely to give rise to substantial claims for the same reasons as set out in 1 above. The causes of action are the same but landlords would be committing lesser breaches.

3 What about shopping centres with supermarkets and pharmacies?

What are the implications where the shopping centre contains a supermarket/pharmacy which are permitted to remain open?

Any action to close the centre is likely to be a breach of the quiet enjoyment covenant and a derogation from grant. Given the essential nature of such businesses, great care should be taken to consult with them about plans for the centre. While the current circumstances may make it reasonable to close the centre for non-essential businesses, they also mean that an essential business is likely to have stronger grounds to require the landlord to keep the centre open. This, of course, assumes that the particular outlet at the shopping centre can be shown to be essential.

4 Suspending centre services

Can the landlord temporarily suspend certain services in the case of partial closure or fully suspend all services in the event of complete shutdown of the shopping centre?

It will depend on how the leases are drafted, but usually the landlord's obligation to provide services is qualified if it is not possible to do so for reasons beyond its control. Therefore, there is likely to be scope to adjust service provision on a case-by-case basis. If leases do not contain this type of qualification, it should be possible to reduce service provision if the tenants are first consulted.

Some services, such as security, should continue to be provided to prevent theft or squatters. Landlords should carefully consider which other services should be maintained and discuss this in any tenant consultation.

5 Social distancing and cleaning measures

What measures does the landlord have to put in place to comply with guidelines on social distancing and cleaning?

The landlord's obligations to keep the centre clean will need to be performed in a manner that is consistent with the current circumstances and how the centre is being used. This will include use of stronger bacterial anti-cleaning products and hand sanitiser being made available at entrances / exits to the centre, toilets and around the common parts, stairs and lifts.

Our understanding is that current government and NHS guidance emphasises the importance of washing hands and maintaining appropriate distances between people. Therefore, signage and other measures reinforcing this message and any subsequent messages should be clearly displayed and steps may be required to limit footfall and customers permitted at any one time in the centre. The use of markers to show the appropriate distance that should be kept may be deployed in common areas.

Landlords should liaise with their insurers to check what, if any, specific requirements they may now have as claims in relation to these issues may well be based on occupier's liability and the duty to visitors, which will be covered by the policy.

In addition, landlords should ensure they are fully up to speed in relation to the Health and Safety Executive's recommendations for businesses and employers in respect of Covid-19, details of which can be found at:

https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19

This was last updated on 7 April 2020, so should be checked regularly as it is published by the HSE as part of its general guidance for businesses, which can be found at:

https://www.hse.gov.uk/simple-health-safety/index.htm

6 Superior Landlord's consent to close the centre

Where the shopping centre is held on a leasehold interest, is superior landlord's consent required to closure or partial closure? If so, and either consent was not sought or refused, what should we do?

It will depend what the lease says but it would be prudent to consult with the superior landlord wherever possible as your approach to the issue will be critical.

If consent is required under the lease and was not sought and the superior landlord then objects, its remedy will be an injunction (an order to open the centre) or damages. The courts are highly unlikely to enforce keep open covenants in leases by way of an injunction even in good economic circumstances, so the prospects of an injunction being obtained in the current climate are remote if the decision has been taken for HSE/public health reasons. In this situation, you should make an application for consent and invite the superior landlord to fully explain its position and substantiate any losses it alleges may flow from the breach.

If consent is refused, then you may need to make an emergency application to Court for a declaration that consent has been unreasonably withheld. This assumes that the landlord's consent provisions are qualified by a requirement not to unreasonably withhold it. If the declaration is obtained in the landlord's favour, then it can close the centre without the landlord being entitled to any damages.

If the lease contains an absolute keep open covenant, then you would need to carefully consider what, if any, losses, the superior landlord might suffer as a result of the breach and then decide whether the HSE concerns are such that it is nevertheless prepared to commit the breach and deal with the superior landlord's financial claim at a later stage.

A breach of a keep open covenant is likely to entitle the superior landlord to forfeit the lease. However, a s146 notice must be served in relation to the breach, which will provide an opportunity to engage with the superior landlord. A Court is likely to look favourably on an application for relief from forfeiture if the reason for the closure is linked

to public health concerns and the plan is to re-open the centre once those concerns are alleviated.

7 Tenants in administration

What happens to tenants who enter administration now e.g. Debenhams? Are rents and service charge payable under the administration if they can't trade or do they only become payable when the store is able to open for trade again?

The administrators' obligation to pay rents and other sums due under the relevant leases on a pro rata basis is based on the "salvage principle". This requires them to give the landlord full value for the property for the period in which the administrators remain in possession of the property with a view to realising the property for the better advantage of the administration. If the administrators are not in possession, then it follows that the landlord could be.

In the current circumstances, the key question will be whether the administrators ever actually take possession of the premises for the purposes of the administration. This will depend on what happens at each premises.

If the administrators either open the premises for trade or sell the tenant's interest in the lease as part of any asset sale, then it's likely that the landlord will be able to claim rents etc for the full period from their appointment up to that point and beyond depending on what happens thereafter. The reason for this is that the administrators have acted in a manner (a) deriving value from the premises and (b) maintaining possession of the premises such that the landlord could not derive value from the premises during that period.

If the administrators never occupy, trade or sell the premises and the lease is disclaimed in any subsequent liquidation, it is unlikely that any rents etc would be payable because no value has been derived from the premises.

Therefore, the situation will need to be carefully monitored in each case. This includes reviewing all statutory reports issued to creditors and monitoring filings at Companies House as well as the usual property inspections (where feasible) and reacting promptly to any correspondence from the administrators.

We are aware that some administrators are currently asking landlords to write off the March quarter's rent on the basis that, unless they do so, the premises will not be included in any sale of the business. This is a bold request and we recommend that it be considered on a case-by-case basis and with reference to the underlying lease documents to ensure you are fully apprised of what it may be giving up if it agrees to such a concession. Most modern leases will include assignment conditions that enable the landlord to refuse consent if there are any rent arrears. By waiving the arrears in full, you may also hamper your ability to refuse consent to an assignment of the lease to a tenant it does not want to take the premises.

8 Upcoming lease events

How do we deal with dilapidations surveys, rent reviews, lease renewals, approach to tenant compliance with yield up/vacant possession/rent arrears on expiry/break date/s27 notices?

Dilapidations surveys

Gaining access

The Covid-19 lockdown may cause practical problems in obtaining access to premises.

It will be lawful for the surveyor to travel to the premises to carry out the survey, as this is travel for the purposes of work where it is not reasonably possible for the surveyor to carry out those services from home[1]

Although the surveyor may be able to carry out an external inspection, it may be difficult to obtain access inside the premises. There is a legal prohibition making it unlawful for the tenant to allow access to the premises save for persons required for the permitted purpose of fulfilling orders received remotely. This means that surveyors will not, by law, be able to access retail units forced to close. In the case of other premises, access remains lawful but may not be possible if no one is to able to give access. Access should always be sought in accordance with the lease terms, and if access is obtained, social distancing practices should be followed.

Deadlines

In all cases, the key point is to check the lease and serve any necessary reinstatement notices (or notices asking the tenant not to reinstate) before lease end, otherwise rights may be lost. Usually, service of the reinstatement notice is the only time-critical element. Some leases may also require a schedule to be served within a specific timeframe.

Dilapidations claims can be pursued after lease expiry. The pre-action protocol says that schedules should be served within a "reasonable time" of lease expiry which will normally be 56 days. However, this is not a hard and fast time limit and we would expect courts to be sympathetic and not impose costs penalties where Covid-19 has caused delays. However, if delays become very long, tenants may exploit these to argue that the deterioration in question occurred post lease expiry. It is therefore worth doing your best to get surveyors in soon after lease expiry (which should be easier as by then you will have the keys and the premises will be vacant).

Rent reviews.

Rent reviews/rent negotiations in respect of rent review dates that occurred prior to the pandemic should continue as normal.

[1] Regulation 6(2)(f) of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020

Rent reviews in respect of rent review dates that occurred on or around the March quarter day may be more controversial and the specific rent review clause of the relevant lease will need to be reviewed to check that time is not of the essence and does not have to be triggered within a specific period.

By way of general comment:

- most rent reviews will be upwards only so, whilst the rent may not increase it should not decrease. In some sectors (notably retail) an increase was probably not expected in any event;

- most leases assume a willing landlord and tenant, so tenants can't argue "no one would take a lease at the moment, so the rent is zero";

- determining the rent that a hypothetical willing tenant would have paid is likely to be challenging for rent review surveyors, though, presumably they would factor in the likelihood that "lockdown" is expected to be temporary and most leases assume that the term of the new lease is at least 5 years;

- many leases have an assumption that the premises can lawfully be used for the permitted use – assumptions like that will be particularly helpful for premises like restaurants which could not have been used on 25 March.

Compliance with yield up/VP on lease expiry/break date

The Covid-19 situation raises some tricky issues for tenants trying to give VP, either on a lease expiry or as part of the break. The current situation does not alter the tenant's obligation to yield up in accordance with the terms of the lease but tenants may face difficulties complying.

In our view it is lawful for a property manager to travel to the premises to check if the tenant has vacated, as this is travel for the purposes of work where it is not reasonably possible to carry out those services from home. If VP has been given, the lease will terminate and a schedule of dilapidations should be prepared.

If VP has not been given, you do not *have* to agree anything to assist a tenant but you may wish to pro-actively contact the tenant to agree a way forward to deal with the dilapidations and VP.

On a lease expiry, or where you are prepared to accept a break and the tenant is unable to give up VP, you may be able to agree a tenancy at will as a temporary arrangement until the tenant is able to remove its goods. This may bring in some revenue (if you are able to charge a rent). Even if you cannot charge rent, it will at least protect you from business rates liability during this period when you will find it difficult to re-let.

If the tenant has not been able to give VP, this may give you the right either (a) to claim a break which is conditional on VP not being validly exercised or (b) to claim damages for failure to give VP and/or claim that a lease is continuing because the tenant remains in occupation. See examples below.

Some examples – lease expiry

	Tenant wishes to continue trading	***Tenant does not wish to continue trading but has been unable to remove goods***
Lease inside 1954 Act	The tenant will remain in business occupation, even if not currently trading, and normal 1954 Act procedures will apply.	Position more debatable. It is arguable that the tenant is still in business occupation (as occupation includes preparations to vacate) unless it has abandoned its goods. The lease may therefore be continued under the 1954 Act and require further notice to terminate it (depending on whether any notices have already been served). If the tenant has abandoned its goods, you are likely to have a damages claim. Most leases will allow you to remove and sell any abandoned goods.
Lease outside 1954 Act	The tenant is holding over either under a tenancy at will (if you are negotiating a new lease) or a trespass (if you have objected to the continued occupation). Normal caution applies about demanding or accepting rent (in order to avoid creating an implied periodic tenancy). The tenant will be liable to pay for its occupation either as damages or under a tenancy at will (which is best expressly formalised).	As above, it is debatable whether the tenant remains in occupation in this scenario. If it does remain in occupation, then it is holding over as a tenant at will or trespasser. If it has abandoned its stock, then you will have a damages claim as noted above.

Some examples – break options

Issue	***Answer***
Can a tenant serve a break notice if in arrears of rent?	Yes, unless the lease expressly says otherwise. However, most leases require the tenant to be up to date with rent before the break date as a condition of the break becoming effective.
Compliance with break condition regarding giving up occupation	Giving up occupation essentially means that no people are remaining and the tenant has returned the keys to the landlord. Even where premises have been forcibly closed this should therefore be possible for the tenant to comply with. If there is some practical reason why the keys cannot be returned (but the tenant has clearly indicated that it is returning the premises), a court may well be sympathetic.
Compliance with break condition regarding giving up vacant possession	This may be well be trickier for tenants. A VP obligation means not only ensuring no one remains on the property and keys are returned but also ensuring that no items are left which substantially interfere with the enjoyment of the property. This may be difficult or impossible for tenants to comply with in current circumstances. Landlords may therefore be able to argue that conditions have not been complied with and therefore that the break does not take effect.
Compliance with break condition regarding paying all rents up to the break date	This is likely to be interpreted strictly. Tenants who are in arrears will not be able to exercise the break.
What if a concessionary rent arrangement has been agreed – does the tenant have to pay the full or concessionary rent to exercise the break?	This will depend on the terms of the concession. If you do have a lease with a break coming up, the concession should expressly address what is required.

Beware of tenants handing keys back

In these uncertain times, it is possible that some tenants may try to unilaterally surrender their leases by either abandoning the premises or returning the keys to the landlord, in the hope that this will bring their lease liabilities to an end. Landlords should send a “key holding” letter in which they make clear that the keys are being held to the tenant’s order and the lease is ongoing, to avoid arguments that they have accepted a surrender.

Lease renewals

Existing renewals

Lease renewals already in progress can proceed as normal.

You may find that tenants are trying to slow the process down. While you may be happy to agree extensions to the statutory deadline, there is nothing preventing you from forcing tenants into court if you want to apply timing pressure.

If you are at the directions stage, it is worth noting that a new CPR practice direction has been issued (51ZA PD). This allows parties to agree an extension of up to 56 days without formally notifying the court (as opposed to the previous 28 days) as long as that does not put a hearing date at risk.

Any extension of more than 56 days needs to be agreed by the court but the court is required to take into account the impact of the pandemic in considering such applications. Courts may also adjourn upcoming hearings, either on the parties' request or their own volition.

New renewals

You may wish to think carefully before serving new section 25 notices. This will allow either party to apply for an interim rent from the earliest date which could have been specified in the notice. Although usually this is the same as the eventual new lease rent, there are exceptions where this would be unreasonable based on the market, and you could find yourself with a very low interim rent in 6 months' time.

However, tenants may serve section 26 notices to take advantage of low interim rents. There is nothing preventing tenants from serving section 26 or section 27 notices even where they are in arrears of rent.

9 Head rent liability

Where the shopping centre is held on a leasehold interest, is the landlord still liable to pay head rent?

The short answer is “yes”. This is subject to the terms of the head lease and there being no particular rent suspension provisions (see question 10 for further detail on this).

Some head leases will have geared rents which are based on a percentage of the rents of occupational tenants. Whether the amount payable is affected will depend on whether the payment is based on a percentage of rents receivable, or actually received.

10 Rent suspension and loss of rent

(a) ***Does the headlease / occupational lease allow for a rent suspension for an outbreak/epidemic such as Coronavirus?***

This will largely depend on the specific lease terms but generally, it unlikely that a tenant will be entitled to a rent suspension under its occupational lease or headlease as the disruption has not arisen from damage or destruction to the premises and/or the centre/retail park so as to render the premises inaccessible. Whilst it is clear that COVID-19 does not amount to a "destruction" of the premises and/or centre/retail park, there have been suggestions that it may amount to "damage" to premises. However, this argument is unlikely to be successful as the damage is not physical.

(b) ***Is loss of rent insured in those circumstances?***

This will depend upon whether loss of rent and/or extra expenses are covered by the landlord's buildings insurance policy, particularly if premises are required to close under the government-mandated lockdown. A standard buildings insurance policy will typically only provide cover for losses resulting from physical damage to the premises so it is unlikely that losses resulting from COVID-19 will be covered unless the landlord has purchased a specific extension to cover (such as a denial of access clause or a notifiable/communicable disease extension as to which see question 12 below).

Even if there is an extension to cover, there must still be a loss which is covered by the policy in order for the insurance policy to pay out for loss of rent. A voluntary rent suspension or waiver is not fortuitous and so will not be covered; but the policy is likely to provide cover if a COVID-19 related event triggers the rent cesser provisions in the lease, which will depend upon the wording in the lease, but is unlikely (see Question 10a) above).

Some landlords are arguing that loss of rent resulting from a refusal by tenants to pay rent due to being unable to access their premises during the lockdown period should be covered, but this is a difficult argument and depends on the precise wording of the insurance policy and the circumstances of each case.

11 Types of Rent Concessions and correspondence with Tenants

(a) *What types of rent concessions can we offer and what is the best way to document these?*

The most common and simplest way to document a rent concession is by way of a side letter, collateral to the lease. Ideally, to create a collateral contract, the letter should contain consideration (although that can be the acceptance of the terms of the letter) and be signed by the tenant. The type of rent concessions that we are seeing very much depend upon the reputational risk appetite of the landlord and include:

- Postponement of rent for an agreed period with a lump sum payment on a fixed date or by instalments.
- Partial payments of rent and postponement of the balance (as above).
- Rent holiday (of varying lengths) or reduction to reflect the projected downturn in turnover for the tenant, with insurance and service charge either continuing or being deferred.
- Application of rent deposit to, say one quarter's rent, with an obligation to top up the rent deposit later.
- Rent payments moving from quarterly to monthly in advance.
- Monthly rent payments moving from in advance to in arrears.
- Various combinations of the above – e.g application of deposit for as long as that lasts and once that runs out, rent will be payable monthly in arrears for 3 months.

Consideration needs to be given to:

- Third party consents required e.g. Superior landlord or lender.
- Circumstances in which you might want to withdraw the concession.
- Forthcoming or pending rent reviews and the impact on them.
- Forthcoming tenant breaks.
- Tenants with existing debt/breaches and not waiving them.
- Ensuring that the letter is not seen as a variation to the lease.
- Whether a Guarantor needs to be a party – in particular, all licences to assign, AGAs and Deeds of Variation to the lease must be checked.
- Whether concessions should be conditional upon a tenant applying for and pursuing a Government loan, with the concession ending once the loan is received.

(b) ***Should correspondence with tenants about the possible terms for rent concessions be sent on an open or without prejudice basis?***

If the purpose of the correspondence is to reject a tenant's proposal and to confirm that the lease terms still apply without putting forward a counter-proposal, then the correspondence can be sent on an open basis. This is the case even if the same correspondence suggests a call or meeting to discuss possible terms/arrangements. This preserves landlords' right to seek the full rent until a formal concession is recorded.

If landlords wish to propose terms for a concession or make a counter-proposal to a tenant's offer, then the correspondence should be marked as "without prejudice save as to costs" because the terms of the offer may show that you are prepared to accept a position that is not a reflection of its full legal rights. It is important to include "…save as to costs" as this means the offer can be shown to the court when it considers how to award costs in any subsequent court proceedings. If the tenant does not accept the proposal, then the landlord can still assert its full legal rights in relation to the rent.

Any formal concession arrangement that follows the exchange of open and/or without prejudice correspondence will be an open document but should include confidentiality provisions.

Where there is any doubt, we recommend that landlords briefly check with their solicitors before sending the correspondence.

12 Are Landlords or Tenants covered by insurance?

Can tenants recover any losses or rent payments through their own business interruption insurance?

Unless there is a relevant extension to cover, a standard business interruption policy will typically only provide cover for losses resulting from physical damage to the premises so it is unlikely that losses resulting from COVID 19 or rent payments are covered.

Policy Extensions

There are two possible extensions to cover that may be relevant:

Notifiable or communicable disease

Some policies provide cover for business interruption losses where it has been necessary to close down the insured premises as a result of a notifiable or communicable disease. The extent to which a business is covered depends entirely on the policy wording.

Often these policies will only provide cover where someone is found to have contracted the disease at or within a certain distance of the premises. It may, therefore, be necessary to check whether there are any confirmed cases of COVID-19 within that area. Other policies may require closure to have been mandated by a competent authority,

which, following a statement by the Prime Minister on 23 March, will now apply to many businesses as the country is in lockdown.

Tenants should also check which diseases are covered. Some policies will only cover certain specified diseases which are then listed in the policy. Given that COVID-19 is a new virus, it is unlikely to be covered. Other policies will provide cover for notifiable diseases. This now includes COVID-19 but only since 5 March 2020.

Denial of access cover

This provides cover for business interruption losses where a business is prevented from accessing its premises by order of a competent authority usually in conjunction with a threat to public health or danger to life. Tenants need to check the policy wording carefully as this cover is usually drafted so as to respond to more localised events (such as a terrorist attack) rather than a global pandemic.

If a tenant is able to make a business interruption claim, it must then quantify its loss. This presents its own difficulties. As a result of case law, a tenant would have to establish that it had suffered a loss due to the denial of access to or closing down of its premises, and not as a result of the widespread impact of the COVID-19 virus more generally. In other words, it would need to compare its actual financial position to the position that it would have been in, had it remained open whilst the population at large was social distancing.

The loss is, therefore, likely to be quite limited.

13 Can a headlease be forfeited for non-payment of rent?

Non-payment of rent is protected by the recent emergency measures such that occupational leases cannot currently be forfeited for non-payment or deferral of rent. Does the same protection apply to headleases?

The Coronavirus Act 2020 provides that the moratorium on forfeiture applies to a "relevant business tenancy".

"*relevant business tenancy*" is defined as:

- a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies; or
- a tenancy to which that Part of the Act would apply if any relevant occupier were the tenant"

"*relevant occupier"* is defined as meaning "in relation to a tenancy, a person, other than the tenant, who lawfully occupies premises which are, or form part of, the property comprised in the tenancy".

A headlease does not usually come within the ambit of limb (a) as the headtenant is not occupying the property for business purposes itself. You then go to limb (b) and so long as you have a subtenant who is in occupation of a part of the property for business

purposes within the meaning of Part 2 of the 1954 Act, that is the tenant for the purposes of limb (a) and so the headlease is brought within the ambit of the 2020 Act and the moratorium applies.

Temporary closure of some or all of the units due to Covid 19 would not affect the availability of this protection as long as at least some of them intend to re-open once the restrictions are lifted.

14 If centre staff are furloughed, can the Landlord recover any top-up through the service charge?

In the event of the shopping centre closing or a reduction in operation being put in place, where centre management team/staff have been furloughed, can the landlord pay the remaining 20% of salaries (assuming the salaries are within the maximum threshold) and recover this through the service charge?

This is will depend on the wording of the service charge provisions in question. There is potential for disagreement with tenants on this point.

Tenants could argue that charges must relate to the provision of services and furloughed staff are not providing any. The topping-up of salary is a voluntary act by the landlord which tenants might resist contribution to on that basis.

A landlord would argue that paying 20% of salaries is better for the tenants than choosing not to furlough the staff (as the provision of services to a closed centre would be minimal) – and would aim for the added benefit of staff retention which will deliver benefits when the centre is reopened. The landlord's position would be that this is an 80% saving to the service charge rather than a voluntary cost.

Most leases contain an express ability for the landlord to vary or reduce services in the interests of good estate management so this may enable the landlord to claim that the decision to furlough and top up the salary is in the interests of the estate. Whether such a claim would be successful will require careful analysis of the wording of each lease and could lead to tenant disputes which are disproportionate in the context of costs.

This is another issue on which engagement with tenants would be useful – for example landlords may wish to explore the possibility of providing the tenants with a letter setting out the intention to furlough, explaining the benefits to the tenants (i.e. a reduced service charge) and giving them an opportunity to object to this approach within a short specified time period. This could flush out whether any tenants are likely to raise objections. However, we acknowledge that in the fast moving environment that may not be possible – particularly with uncertainty over whether the Government's furlough scheme will be extended after 30 June. Landlords may need to take a view on this point depending on the nature of the centre, the staff and the costs involved.

15 Options available for recovery of rent

What options are available for recovery of rent including pursuing former tenants/guarantors?

Landlords have a number of options available to them, including the threat of winding-up proceedings, CRAR, pursuing guarantors or former tenants, or drawing on rent deposits. We expand on these further below, but note that the recent Government announcement imposing further restrictions on the use of winding up petitions, statutory demands and CRAR mean that use of these remedies are limited. We comment on the new Regulations issued in relation to CRAR below, but at the time of writing this the Regulations relating to statutory demands and winding up petitions have not been released. What we do know is that the use of statutory demands and winding up orders where a company cannot pay its bills due to coronavirus will be temporarily banned. There may therefore be limited circumstances in which these remedies can still be used.

Statutory demands and winding-up proceedings

The aim is to use the threat of winding-up to make the tenant pay. You don't actually want to get to the stage of winding up the tenant, as that would involve paying money to start a liquidation process in which you will be an unsecured creditor. But you may need to get a certain way through the process to put pressure on the tenant to prioritise your debt. This option should be reserved for tenants whom you think have or could find the money rather than those which are hopelessly insolvent.

In order to start the winding-up process, a landlord creditor has first to show that the tenant company is insolvent, i.e. unable to pay its debts as it falls due. There are two methods of approaching this and taking these preliminary steps in the winding-up process can be an effective tool to make tenants pay attention and prioritise your rent.

- The simplest and quickest method is to send a solicitors' letter demanding payment of the rent within 7 days with a threat of winding-up if they don't pay (a "7-day letter"). You can then rely on the failure to pay as *factual evidence* of insolvency when it comes to any future winding up hearing. This is normally our preferred method.

- The alternative method is to serve a "statutory demand" which is a formal legal document giving the tenant 21 days to pay. If it does not pay within that period it is *legally* deemed insolvent and this also provides grounds for applying to the court to wind up the company. This is a slightly lengthier document to produce and the 21-day timeframe is slower, but it does create a legal deadline.

As a result of the new measures being introduced by the Government, any winding up petition that claims a company is unable to pay its debts must first be reviewed by the court to determine why. The new law (which is currently stated to apply until 30 June, but could be extended) will not permit petitions to be presented or winding up orders made where the company's inability to pay is as a result of COVID-19.

CRAR

CRAR is a possible remedy but since the new Coronavirus Regulations introduced on 24 April 2020, a new minimum amount of net unpaid rent applies so during the period between 25 April and 30 June 2020 (or as extended by the Government) a landlord cannot serve an enforcement notice or take control of goods unless there is at least 90 days' unpaid rent.

CRAR is only likely to be effective where:

- The premises are open (as bailiffs have no power to break into locked premises without a court warrant),
- You can find a bailiff willing to exercise CRAR (not easy currently), and
- There are enough valuable goods on the premises belonging to the tenant to make it worthwhile (although the embarrassment factor where the CRAR is exercised publicly can also make a tenant pay).

Service of the 7-day notice letter may have an effect on some tenants who satisfy the above criteria. However, we suspect that tenants whose premises are closed may well realise that the threat is limited and pay it less attention.

The 7-day warning notice has a validity period of 12 months, so if you serve it, but can't get in, you can then send bailiffs in at a future point within the next year once the current restrictions are lifted. This won't be the quickest way to secure rent but some landlords have been serving notices to give them the option of exercising CRAR once the lockdown eases.

CRAR is only exercisable over goods belonging to the tenant. Third parties have a right to intervene if the bailiff mistakenly takes their goods, to prevent their sale.

CRAR also gives you the right to serve a notice on any sub-tenants at the premises to pay future rent directly to you where you have not received rent from your direct tenant – but this is unlikely to assist in the current climate where none of the occupational tenants are likely to be paying rent.

Issuing court proceedings

You can also sue for the unpaid rent as a debt. This is rarely worthwhile due to the time and costs involved, and the need then to take separate proceedings to enforce the judgment if it is still not paid.

Granting more time to pay

With some of your tenants you may wish to agree deferred payment arrangements. See answer to Question 11.

Guarantors/ AGAs/ Rent Deposits

Rent deposits may be used for non-payment of rents, but are unlikely to be topped up, so this is a last resort.

You may pursue guarantors of current tenants. Check the terms of guarantees for any time limits or required procedures for making demands. If the guarantor does not pay, you may be able to issue winding-up proceedings and/or sue in court.

There may also be former tenants or guarantors of former tenants who are potentially liable. You should carry out an audit to identify any leases and licences to assign where you may have such recourse as you need to serve formal notices in prescribed form (under section 17 of the Landlord and Tenant (Covenants) Act 1995) on any former tenants or their guarantors within 6 months of the sum falling due, in order to preserve your rights against former tenants or guarantors.

Reputational issues

There has been a lot of coverage in the press about landlords who have taken what are perceived, by some, to be aggressive steps to enforce rent payment obligations. Reputational issues need to be borne in mind when deciding what steps to take.

Future operational issues

16 Re-opening the centre, servicing capacity and service charge apportionment

(a) ***Re-opening centres – What happens if tenants want to return/re-open at different times? Servicing capacity for re-stocking?***

Tenants returning

If a tenant wants to return, then it is likely that you will have to allow this (as long as their reopening is not a breach of the lockdown regulations). Otherwise, you may face a claim for breach of quiet enjoyment/ derogation from grant.

This may give rise to logistical issues. However, tenants should be amenable to having an open discussion about how to manage re-opening properly and safely.

Many leases will allow you to alter services in the interests of good estate management and you may wish to consider what services are provided where shopping centres or multi-let premises are only partially re-opened. Ideally, you would consult with tenants regarding this. For example, if only a few shops are open, it may be reasonable to have a limited security and cleaning presence and no additional services such as concierge.

See Q16B below on service charge.

Servicing capacity for re-stocking

There may be practical difficulties caused by all the tenants wanting access to a goods yard at the same time to re-stock. This will require some coordination and should be managed in accordance with the principles of good estate management. Again, an open dialogue with tenants may assist.

(b) ***Service charge apportionment and liability - a number of occupiers will say they did not benefit from the services whilst closed, for those essential retailers that remained trading what is a reasonable apportionment of costs whilst the centre remained trading? How can we prevent continued withholding of service charges when the centre opens fully again and service charges are being disputed?***

Service charge apportionment and liability

Most leases require tenants to pay service charge based on a fixed percentage or formula (such as relative floor area or rateable value, sometimes subject to weighting). Most leases are drafted so that the tenants' liability relates to the cost to the landlord of providing the services to the centre not whether they are using the services. In the case of such leases, it is unlikely that a tenant's inability, or unwillingness, to trade would affect how the service costs are calculated and charged to the tenant.

We recognise that this does appear particularly unfair in a case where, say, one big supermarket within a centre is open for trade and making a large profit and all the other

units are closed. In practice, the supermarket is receiving the benefit of all the services but all the tenants are being asked to pay a share of costs. This is likely to give rise to disputes. As noted, it is not clear that tenants in such a situation have any legal right to adjust payment, but you may face resistance in collecting charges. Many leases have dispute resolution provisions which will need to be followed.

There may be some leases where the service charge provisions make references to a tenant paying "a fair proportion" of the charges as determined by the landlord's surveyor, or where the charges are to depend on usage. In such leases, there may be arguments that tenants who are shut should pay less, and those who are open should pay more, but these will need to be examined on a case-by-case basis.

We anticipate service charges being a particular area for dispute and you should seek legal advice in each case.

Complete closure

Where shopping centres are completely shut, there are some charges that still need to be incurred. These should be recoverable from tenants in the normal way as necessary for the running of the centre. We anticipate less dispute over this.

Dealing with disputes

It is worth being proactive when issuing service charge demands in explaining lease requirements so tenants understand why they are being asked to pay, and also explaining the steps you have taken to keep costs low (e.g mothballing some services and furloughing staff; that if the centre was partially open this was only with a skeleton security and cleaning staff and that certain costs of security and maintenance would have been required even if the centre was completely closed).

Some leases will have dispute resolution clauses which may require tenants to pay the full amount before they can raise a dispute, or put time limits on raising disputes.

17 Repurposing retail space

Approach to re-purposing space or sharing space that may arise when social distancing measures are relaxed.

Tenants wanting to repurpose space

This will depend on the specific terms of a tenant's lease. If a tenant wants to repurpose the space which it occupies, this may require landlord's consent (and/or superior landlord and lender consent). You should consider whether you object. The tenant may also need planning permission.

Landlord wanting to repurpose space

This is largely a commercial matter. In some cases you may need superior landlord and lender consent, as well as planning permission (depending on what is being proposed and whether it constitutes a material change of use for example).

Transactional issues

18 Transactional Issues with signing, exchange & completion

Remote signing, exchange & completion –types of transactions for which remote signing are appropriate.

No.	***Method of execution***	***Documents that can be executed using this method***	***Comments***
1.	Power of Attorney	All	Power of Attorney needs to be in place. If a Power of Attorney is not in place consider putting one in place asap. Power of Attorney may be used for hard copy engrossments, electronic signatures and Mercury procedure (see 4 below).
2.	Hard copy engrossments to client signatories	All	Impractical if signatories are not within a reasonable proximity of the solicitors' offices. Couriers must be available.
3.	Electronic signatures (e.g. through DocuSign)	All documents that do not need to be registered at the Land Registry.	DocuSign requires the solicitors issuing the document for execution to have a licence but not the recipient. Caution regarding witnessing execution.
4.	Mercury procedure	All documents that do not need to be registered at the Land Registry. If hard copy engrossments and couriers are unavailable, solicitors should consider using Mercury procedure for	The procedure needs to be followed properly. It involves a pdf engrossment being emailed to the signatory, the signatory printing the execution page and returning a scan of it to the solicitor. Further details and instructions should be

		documents to be registered at the Land Registry.	provided if this method of execution is to be used.

19 Transactional workarounds

How do we avoid problems with remote completions (i.e. options for pushing out completions etc.)?

Whether remote completions can be avoided will depend on the circumstances. In some cases, it may be possible and appropriate to enter into licences to occupy or tenancies at will as temporary measures to avoid the formalities of executing and completing new leases at this time.

Where a lease has statutory protection under the 1954 Act, it may be appropriate to allow the tenant to "hold over" under the 1954 Act until social distancing measures have been relaxed. Where renewal proceedings have been initiated under the 1954 Act, it may be possible to agree to stay them until social distancing measures have been relaxed.

Where matters are business critical and cannot be dealt with through temporary measures, it may be necessary to include specific "Covid clauses". The nature of these clauses will depend on the circumstances, but such clauses will seek to deal with issues arising from delays caused by Covid 19. For example, an agreement for lease conditional on landlord's works could include a Covid clause allowing for an extension of "Target" or "Longstop" dates, for delays attributable to Covid 19.

20 Notice services and receipt

It should be considered whether more appropriate notice provisions are required during this time. While varying documents to achieve this is probably unnecessary, temporary changes to notice provisions could be agreed between landlords and tenants by formal letter or even by way of email.

It is important that notice provisions allow for valid service at registered offices. Are registered offices up to date? Are there adequate processes in place for post received at registered offices to be forwarded, including scanning and email items to the appropriate person? It may be worth considering whether a mail redirect service can be put in place, if post is not being collected at the usual addresses for service.

To deal with difficulties with receiving hard copy post, it could be agreed for notices to be served by email as well as by post. Email notices should include multiple recipients to reduce the possibility of them being missed.

21 Contracting out process

How do we avoid practical difficulties around statutory declarations?

Service of 1954 Act papers by email, following receipt of consent to do so, would be an appropriate alternative to sending out hard copies at this time.

To avoid practical difficulties around signing statutory declarations, the following measures should be considered:

- Allowing tenants to sign simple declarations. If this is agreed, the additional 14-day period should be factored into the timings for the transaction.

- Where solicitors share a house with other practising solicitors, authorising those solicitors to sign statutory declarations in front of the other solicitor, provided the other solicitor has not otherwise been involved in the transaction.

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